United States Court of Appeals,Seventh Circuit.

Eusebio GUEVARA, Petitioner,

v.

Alberto R. GONZALES, Respondent.

No. 05-2696.

Argued March 31, 2006.

Decided Jan. 8, 2007.

Before ROVNER, EVANS, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Eusebio Guevara, a citizen of Honduras, petitions for review of a decision of the Bureau of Immigration Appeals ("BIA") reversing an immigration judge's ("IJ") discretionary grant of a waiver of removal under 8 U.S.C. § 1182(c). Guevara argues that the BIA applied the wrong standard of review and exceeded its authority by ordering his removal from the United States. We deny the petition for review.

I. Background

Guevara is a Honduran who legally entered the United States in 1985 and became a lawful permanent resident in 1990. In 1991, while living in California, he was convicted of retail theft after he shoplifted a pair of pants. In 1996, while living in Wisconsin, he was convicted of two counts of fourth-degree sexual assault in violation of section 940.225(3m) of the Wisconsin Statutes and sentenced to 63 days' imprisonment and 18 months of probation. In June 2004 Guevara left the United States to visit family in Honduras. Upon his return a month later, he was placed in removal proceedings pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) as an alien removable for having been convicted of a crime involving moral turpitude.

An IJ found Guevara removable based upon his sexual assault convictions. Guevara sought a discretionary

waiver of removal on the grounds of rehabilitation and economic hardship pursuant to the now-repealed 8 U.S.C. § 1182(c). This section, commonly referred to as § 212(c),[1] was repealed by the Immigration Reform and Immigrant Responsibility Act of 1996, but its repeal was subsequently held to be inapplicable to aliens, like Guevara, whose convictions were obtained by guilty plea prior to the Act's effective date of April 1, 1997. *INS v. St. Cyr,* 533 U.S. 289, 318-25, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (holding that the repeal of § 212(c) had an impermissibly retroactive effect on aliens who pleaded guilty prior to the Act's effective date). Section 212(c) permitted certain classes of permanent resident aliens, otherwise removable, to be admitted "in the discretion of the Attorney General" if they were returning from a temporary and voluntary journey abroad to a "lawful unrelinquished domicile of seven consecutive years." Guevara's eligibility to seek a § 212(c) waiver is not at issue here.[2]

After a hearing at which Guevara was the only witness, the IJ weighed the positive and negative equities presented by the case and elected to grant Guevara a discretionary § 212(c) waiver of removal. The government appealed to the BIA, which adopted the IJ's findings of fact but reversed his weighing of the factors pertaining to the discretionary waiver of removal. The BIA concluded that the negative equities outweighed the positive to the extent

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[1] The former 8 U.S.C. § 1182(c) was § 212(c) of the Immigration and Nationality Act of 1952.

[2] The Department of Homeland Security has promulgated a rule limiting the discretion of IJs to grant § 212(c) waivers in certain instances, but the government does not contend that Guevara falls within any of the enumerated categories that would render him ineligible to invoke the protections of the repealed section. *See* 8 C.F.R. § 1212.3. For further restrictions on the eligibility for a § 212(c) waiver not applicable here, see *Matter of Blake,* 23 I. & N. Dec. 722 (BIA 2005).

that Guevara should not receive a discretionary waiver. The BIA did not remand the matter to the IJ for further action; instead, the BIA's decision included an order removing Guevara from the country.

In his petition for review, Guevara argues that the BIA exceeded its legal authority in two ways. First, he contends the BIA applied the wrong standard of review when it reversed the IJ's discretionary grant of the § 212(c) waiver. Second, he contends the BIA was not authorized to order him removed from the country when such an order was not first entered by the IJ.

II. Discussion

A. Discretionary Grant of § 212(c) Waiver of Removal

Subject to certain exceptions not pertinent here, this court has no jurisdiction to review the merits of the BIA's exercise of discretion. 8 U.S.C. § 1252(a)(2)(B); [3] *see Jarad v. Gonzales,* 461 F.3d 867, 869 (7th Cir.2006). Further, under 8 U.S.C. § 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2)," the section applicable to Guevara's case. Recognizing these jurisdictional limitations, Guevara characterizes his first argument as a challenge to an error of law on the part of the BIA, which is reviewable pursuant to 8 U.S.C. § 1252(a)(2)(D) notwithstanding the limitations just mentioned. Specifically, Guevara argues that the BIA applied an incorrect standard of review in reversing the IJ's decision granting the waiver of removal.

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[3] This section provides in pertinent part that "no court shall have jurisdiction to review ... any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security."

Pursuant to 8 C.F.R. § 1003.1(d)(3), an IJ's findings of fact are subject to a clearly erroneous standard of review by the BIA, but "the Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo." Guevara claims the BIA improperly rejected facts found by the IJ by failing to apply the clearly erroneous standard of review. This argument rests on a misreading of both the IJ's decision and the BIA's.

The IJ's decision lists what he identified as the positive and negative factors in Guevara's case that should be balanced in the exercise of discretion under § 212(c).[4] The negative factors weighing against a waiver were Guevara's criminal convictions-especially the more serious sexual assault convictions-and his denial before the IJ that he actually committed the sexual assaults. On this latter point, Guevara acknowledged at his hearing that he pleaded guilty to the sexual assault charges but said he did so on the advice of his attorney; he denied that he actually committed the offenses. The IJ identified the following positive factors: the duration of Guevara's residence in the United States (over nineteen years at the time of decision), his steady employment during that time, the lack of any criminal convictions in the eight years following his sexual assault convictions, his credible expression of remorse for his crimes,[5] and the economic difficulties that would accompany Guevara's return to Honduras. The IJ concluded that "the

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[4] The IJ's identification of the factors pertinent to the balancing of equities was drawn from the BIA's decisions in *Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990), and *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

[5] The IJ's finding that Guevara was remorseful is difficult to reconcile with Guevara's denial that he committed the sexual assaults, which the IJ identified as a negative factor that weighed against a discretionary waiver of removal.

equities do outweigh the negative factors represented by his convictions." With respect to the passage of time since Guevara's last criminal conviction, the IJ held as follows:

> The record indicates that he has not been convicted of any crime since 1996. I think, therefore, that it can be said that the respondent has been reformed so that he has chosen a way of life where future criminal misconduct is unlikely because he has not been involved in criminal misconduct since his November of 1996 conviction.

On appeal, the BIA addressed both the IJ's factfinding and his balancing of the pertinent factors as follows:

> In accordance with *Matter of Marin,* 16 I & N Dec. 581 (BIA 1978), the Immigration Judge sufficiently set forth the positive and negative factors presented in this case. We adopt those findings [citation omitted]. However, upon weighing those factors, we agree with the DHS that the respondent does not merit a discretionary grant of a section 212(c) waiver. *See Matter of Buscemi,* 19 I & N Dec. 628 (BIA 1988). We acknowledge the difficult conditions in Honduras, the respondent's long residence in the United States, his employment history, and the financial support he provides his family. *In this case, we consider rehabilitation to be a neutral factor.* On the one hand, 9 years have passed since the respondent's criminal conduct. On the other hand, he still has not fully acknowledged his wrongdoing. All in all, the seriousness of the respondent's sexual assault convictions, as well as the circumstances of those offenses, outweigh the favorable equities in this case.

(Emphasis added.)

The issue Guevara raises here centers on the sentence we have emphasized in the paragraph quoted above from the BIA's decision. Guevara argues that the IJ found as a matter of fact that he had "reformed" or "rehabilitated" himself in the years following his conviction and the BIA

failed to apply the clearly erroneous standard of review to that finding. According to Guevara, the BIA simply disagreed with the IJ's finding of rehabilitation and rejected it out of hand, rather than finding it to be clearly erroneous under the more demanding standard of review applicable to an IJ's factfinding. The government responds that the BIA did not reject the IJ's factfinding but simply concluded that the IJ had given the matter of rehabilitation too much weight when balancing the equities.

We do not read the BIA's decision as a rejection of the IJ's factfinding on rehabilitation; to the contrary, the decision specifically adopted the IJ's findings on the positive and negative factors in Guevara's case. Rather, the BIA reweighed the positive and negative factors and concluded that rehabilitation was a neutral factor rather than a positive one. The BIA determined that the IJ had given undue weight to Guevara's rehabilitation vis-à-vis the negative factors in his case. The relative weight of Guevara's rehabilitation in the balancing process is not "factfinding" subject to the clearly erroneous standard of review; it is a matter of discretion and judgment and is subject to de novo review by the BIA. Accordingly, the BIA did not apply the incorrect standard of review in reversing the IJ's discretionary grant of the removal waiver.

B. The BIA's Order of Removal

Guevara next argues that the Board had no authority to order his removal from the country when no such order had been entered in the first instance by the IJ. The IJ held that Guevara was "subject to removal" pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) by virtue of having committed a crime of moral turpitude. However, the IJ did not order Guevara's deportation-notwithstanding his removability-but instead granted the discretionary waiver of removal discussed above. The BIA, having concluded on appeal that the IJ improperly balanced the equities in making the waiver decision, reversed the discretionary grant of relief and ordered Guevara

"removed from the United States to Honduras." Guevara now argues that the power to enter such an order rests solely with the IJ and not the BIA. In support of his argument, Guevara cites a Ninth Circuit case holding that the BIA is restricted to affirming or reversing orders of removal, not issuing them in the first instance. *Molina-Camacho v. Ashcroft,* 393 F.3d 937, 940 (9th Cir.2004).

But the Second, Fifth, and Eighth Circuits have held otherwise on this issue, and we agree with the conclusions of these circuits. *See Lazo v. Gonzales,* 462 F.3d 53, 54-55 (2d Cir.2006); *Delgado-Reynua v. Gonzales,* 450 F.3d 596, 600-01 (5th Cir.2006); *Solano-Chicas v. Gonzales,* 440 F.3d 1050, 1054 (8th Cir.2006). As recognized in these opinions, the conclusion that the BIA has the authority to enter the order it did in Guevara's case flows from the definition of "order of deportation" contained in the Immigration and Naturalization Act: "The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, *concluding that the alien is deportable* or ordering deportation." 8 U.S.C. § 1101(47)(A) (emphasis added).

This section also provides that an "order of deportation," as defined above, "shall become final upon the earlier of a determination by the Board of Immigration Appeals affirming such order" or the expiration of the time to appeal to the BIA. 8 U.S.C. § 1101(47)(B). For purposes of this section, the phrase "special inquiry officer" is synonymous with an IJ, *see* 8 C.F.R. § 1.1(l), and the phrase "deportable" is synonymous with the term "removable," *see Evangelista v. Ashcroft,* 359 F.3d 145, 147 n. 1 (2d Cir.2004); *Avila-Macias v. Ashcroft,* 328 F.3d 108, 111-12 (3d Cir.2003). Thus, if an IJ decides that an alien is removable but does not ultimately order removal due to a grant of a waiver, cancellation, or the like, the decision that the alien is removable is nonetheless an "order of

deportation" that may be affirmed by the BIA. *See Solano-Chicas,* 440 F.3d at 1054 ("Thus, it follows that where the BIA reverses the IJ's order granting cancellation of removal, the BIA, in essence, gives effect to the IJ's order of removability, for the BIA decision eliminates the impediments to removal."); *Lazo,* 462 F.3d at 54 ("[T]he BIA did not 'order' Lazo's removal (as Lazo characterizes the order); the BIA has removed an impediment to the removal that was ordered by the IJ."); *Delgado-Reynua,* 450 F.3d at 601 ("We join the Eighth Circuit in concluding that where the BIA reverses an IJ's grant of discretionary relief and gives effect to the IJ's original order of removability, the BIA has merely eliminated 'impediments to removal' and effected the original removal order.").

In Guevara's case, the IJ initially determined that Guevara was removable for having committed a crime involving moral turpitude. Pursuant to 8 U.S.C. § 1101(47)(A), this threshold determination constituted an order of deportation (i.e., removal) that could be given effect by the BIA once it reversed the IJ's subsequent conclusion that Guevara was entitled to a discretionary waiver of removal pursuant to § 212(c). In other words, the BIA rejected only the waiver determination in the IJ's decision, leaving the IJ's first holding-that of removability-intact. The BIA was thus empowered to order Guevara removed to Honduras.

The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A91 816 037 – Chicago Date: MAY 17, 2005

In re: EUSEBIO GUEVARA

IN REMOVAL PROCEEDINGS

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude

APPLICATION: Section 212(c) waiver

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals the Immigration Judge's December 6, 2004, decision granting the respondent a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The respondent has filed an opposition. Both parties filed supplemental briefs following the Board's recent decision in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). The appeal will be sustained.

The respondent is a native and citizen of Honduras. He adjusted his status to lawful permanent resident in 1990. On July 9, 1991, the respondent was convicted upon a plea of guilty in a California State court to one count of petty theft in violation of Cal. Penal Code §§ 484, 488 (West 1991). He was sentenced to 1 day in jail and 3 years of

probation. On November 27, 1996, the respondent was convicted in a Wisconsin State court upon a plea of no contest to two counts of fourth-degree sexual assault in violation of Wis. Stat. § 940.225(3m) (1996). He was sentenced to 63 days in prison and concurrent 18-month periods of probation.

On appeal, the DHS challenges the respondent's statutory eligibility for section 212(c) relief with respect to his sexual assault convictions, as well as the Immigration Judge's exercise of discretion to grant such relief. First, we conclude that the respondent is statutorily eligible for section 212(c) relief. Having entered his plea agreement between April 24, 1996, and April 1, 1997, the respondent is eligible to apply for relief under section 212(c) of the Act "as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996." 8 C.F.R. § 1212.3(h)(2). As so amended, section 212(c) of the Act does "not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241 (a)(2)(A)(iii), (B), (C) or (D)" of the Act. Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,110 Stat. 1214, as amended by section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208,110 Stat. 3009-546. To be deemed one who "is deportable" under the amendment to section 212(c) of the Act, the alien must be charged with and found deportable on one of the grounds specified in the amendment. *Matter of Fortiz*, 21 I&N Dec. 1199, 1201 n.3 (BIA 1998); *see also* 8 C.F.R. § 1212.3(f)(4). In this case, as an arriving alien the respondent was charged with removability under section 212(a) of the Act. He has not been charged with removability under section 237(a)(2)(A) of the Act, 8 U.S.C. § 1227(a)(2)(A), which is the successor statute to former section 241(a)(2)(A) of the Act, 8 U.S.C. § 1231(a)(2)(A)(i). He therefore has not been rendered "deportable" as a result of his conviction. *Matter of Fortiz, supra*; *see also Matter of*

Fuentes-Campos, 21 I&N Dec. 905 (BIA 1997). Accordingly, he remains eligible to seek a section 212(c) waiver.

Similarly, disposition of this case is not affected by our holding in *Matter of Blake, supra*, because the respondent has not been charged with removability as an aggravated felon. For these reasons, we conclude that the respondent is statutorily eligible for section 212(c) relief. Accordingly, we must address the Immigration Judge's exercise of discretion.

In accordance with *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), the Immigration Judge sufficiently set forth the positive and negative factors presented in this case. We adopt those findings (I.J. at 5-6, 9-11). However, upon weighing those factors, we agree with the DHS that the respondent does not merit a discretionary grant of a section 212(c) waiver. See *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). We acknowledge the difficult conditions in Honduras, the respondent's long residence in the United States, his employment history, and the financial support he provides his family. In this case, we consider rehabilitation to be a neutral factor. On the one hand, 9 years have passed since the respondent's criminal conduct. On the other hand, he still, has not fully acknowledged his wrongdoing. All in all, the seriousness of the respondent's sexual assault convictions, as well as the circumstances of those offenses, outweigh the favorable equities in this case. Accordingly, the DHS's appeal will be sustained.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The respondent is ordered removed from the United States to Honduras.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 91 816 037

December 6, 2004

In the Matter of	)	
EUSEBIO GUEVARA	)	IN REMOVAL PROCEEDINGS
	)	
Respondent		

CHARGE: Section 212(a) (2) (A) (i) - convicted or having committed or committing acts which constitute the essential elements of the crime involving moral turpitude.

APPLICATIONS:
212(c) waiver.

ON BEHALF OF RESPONDENT:
Claudia Valenzula, Esquire

ON BEHALF OF DHS:
John Gountanis, Esquire

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 45-year-old married male who is a native and citizen of Honduras. He was placed in proceedings when he attempted to enter the United States on

July 9, 2004 at Milwaukee International Airport. A Notice to Appear was issued on September 13, 2004, and directed to the Chicago Immigration Court. The respondent acknowledged having received it, and acknowledged that he was properly served.

The respondent has pled to the allegations in the Notice to Appear admitting allegations one through five. Specifically he admits that he is not a citizen of this country, rather, he is a citizen of Honduras, and he was admitted or adjusted to the United States as a permanent resident on December 1, 1990. He also admits that he presented himself for inspection initially on July 9, 2004, and later on September 8, 2004 at Milwaukee, Wisconsin. The respondent denied that he was convicted of petty theft on July 9, 1991 in San Diego, California, or that he was convicted on November 27, 1996 of fourth degree sexual assault in Wisconsin. He also denies that he is subject to expulsion on the charge.

Notwithstanding the respondent's denials, the Department of Homeland Security has presented conviction records evidencing the respondent's convictions. For example, in Exhibit 2, the conviction records show that the respondent pled guilty, and then was found guilty on November 27, 1996 of fourth degree sexual assault. It indicates that Eusebio Guevara was convicted of that crime which is a misdemeanor under the law of Wisconsin. And he further indicates that he was placed on probation for a period of 18 months.

In addition, page 17 of Exhibit 2 indicates the respondent pled guilty to a misdemeanor of retail theft in San Diego County. The respondent has testified today that he was convicted of that offense. I find, therefore, that the conviction records do establish that the respondent was convicted of the offenses indicated in his Notice to Appear. I specifically find that his conviction of fourth degree sexual

assault constitutes a crime involving moral turpitude rendering him subject to removal.

Although the charge was contested, the principal issue in this case is really the respondent's eligibility for 212(c) waiver. The respondent contends that he is eligible for the waiver because his convictions occurred prior to April 1, 1997. He contends that he pled guilty, that the plea agreement was reached prior to the date indicated in the regulation, and that the regulation does provide for his eligibility insofar as he does not fall within any of the prescribed provisions. The Department, in contrast, contends that the regulation does not apply to him, that he does not fall within the regulation because he was seeking admission and out of the United States when he returned.

I find that the regulation which took effect in October of 2004 does apply to the respondent. I reach that conclusion for a number of reasons. First, the respondent did enter into a plea, did enter a plea of guilty, between April 24, 1996 and April 1, 1997. The respondent and is a permanent resident. The regulation specifically applies to such an individual. The respondent does not fall within any of the prescribed provisions or conditions contained in the regulations under Subsection 3, Subsection 4 and 5, listing those bars, namely alien who is subject to inadmissibility under paragraphs 3-A, 3-B, 3-C, 3-E, alien who has been convicted of one or more aggravated felonies, et cetera, an alien is not ineligible for 212(c) relief on account of an aggravated felony conviction pursuant to a plea agreement. He does not fall within any of those. In addition, I note that the response to the comments received, page 57828 of the regulations, column 1, specifically refer to the purpose of the regulations as to provide for 212(c) eligibility for aliens who are permanent residents, but not to allow those aliens who have been deported or removed from the United States to return to the United States after leaving or being expelled under a final order of removal to pursue 212(c) claims. However, that is not the case here. The respondent has not

been ordered removed or has not departed under an order of removal and then sought to return to the United States. In contrast, this alien was seeking to return to the United States as a permanent resident earlier this year and was then placed in proceedings. So I do find that the respondent's situation, namely permanent resident who had never had an opportunity to present a waiver under 212(c) who became a permanent resident in 1990 through adjustment of status, who was convicted of crimes before April 1, 1997, and whose last conviction was pursuant to a plea agreement entered into in November of 1996, is covered by the regulation. See the regulation entitled Executive Office for Immigration Review, Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, 8 C.F.R. Parts 1003, 212, 1212, and 1240.

In regard to whether the respondent should be granted the waiver, I note that the following testimony and evidence is of significance. First, the respondent testified today that he is 44 years of age, that he is married, born in Honduras, that his wife and all but one child are in Honduras.[1]

He testified that he entered the United States in 1985, that he legally entered at that time. He worked in agriculture and was able to obtain a temporary resident status in 1988, and then permanent residence under the Special Agricultural Worker provision of Section 210 in 1990 when his status was adjusted.

He testified that he has made five trips out of the United States, and he further testified in the last departure he went back because of the illness of one of his children. He stayed there for seven months.

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[1] I note that the respondent states on his I-191 he was born 8/14/59. That would make him 45 years old.

He testified that he was convicted of stealing a pair of pants in San Diego. He stated that he regretted doing that, and then he completed his probation successfully for it.

He also stated that he was convicted of sexual abuse in 1996. His version of the incident is presented in his testimony. He stated that a girl called the police. The girl was the child of his girlfriend, that he was staying at her house. He described his girlfriend as "Baby Harrison." He admitted on cross-examination that he returned to live with her briefly after his conviction and release from prison, but has not seen her for the last six or seven years. The respondent further testified that he pled guilty, but denies that he ever touched the child in any way. He claims that the agreement to plead guilty was the result of a discussion that he had with his attorney. Nonetheless, he states that he regrets the incident.

The respondent maintains that he has not been convicted of any other crimes since his conviction of sexual abuse in 1996. He claims that the economic situation in Honduras is dire, that there is no work for him there, that any jobs that are there would require heavy lifting which he is not capable of. He claims that he has visited Honduras to visit his family, and that regularly sends them money to support them. He claims that he has been paying taxes on his income in the United States.

I have considered this testimony as well as the statements that the respondent has presented in his support. Some of the statements indicated that the respondent was involved in charitable work for those victims of Hurricane Mitch in Honduras. See Exhibit No. 4. See also the letter from the respondent's sister in his support.

The Department has expressed opposition to the respondent's waiver not only on statutory grounds, that is he does not qualify for the regulation, but also on other

grounds.[2] Apart from the question of statutory ineligibility, there is a dispute concerning whether the respondent merits the relief. The Department contends that the respondent has not shown rehabilitation, that there are no favorable or positive factors in this case, that his son never appeared to testify on his behalf, although he is in the United States, that the respondent, although citing conditions in Honduras, and the existence of TPS there, would not be eligible for TPS if he applied because of his conviction of an aggravated felony, and, further, that the respondent regularly visits Honduras and is going to be sent back to the same country where his family is living. In contrast, he has never admitted his culpability of his offense.

I agree that the criteria to be considered is set forth in Matter of Marin, a 1976 BIA decision in which the Board listed both favorable and unfavorable factors. In subsequent cases, the Board held that the favorable factors may have to reach the level of unusual or outstanding equities if because of the nature or the seriousness of the offense such equities are required, but under Matter of Edwards, the Board held that these are not to be considered a threshold requirement.

The negative factors clearly are the respondent's conviction, the retail theft conviction initially, and then the sexual abuse in the fourth degree in November of 1996. The nature of the offense and the items stolen in San Diego indicate that this was not a serious offense. First of all, it is a misdemeanor. Secondly, the amount involved, a pair of pants, jeans, had relatively little value, and there is no indication that the respondent was involved in a pattern of

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[2] It is agreed by all concerned that the respondent is not eligible for a 240A (a) waiver insofar as his crime, sexual abuse in the fourth degree, did involve a minor, that is a young woman, and, thus, he is ineligible for cancellation of removal because he has been convicted of a crime involving sexual abuse of a minor which is an aggravated felony under Section 101(a)(43)(A) of the Act.

stealing which culminated in this conviction. Certainly the Court imposed only probation on him, and, consequently, there is no indication that the Court who sentenced him in San Diego considered this to be a serious offense. However, the sexual abuse crime is certainly more serious. The respondent pled guilty to abusing a minor, a young girl. The conviction record indicates that he did plead guilty to that offense, and the offense requires for a conviction under Wisconsin State law that he has contact with a person without the consent of that person, and if so, is guilty of a Class A Misdemeanor. I do not credit the respondent's testimony that he did not understand the reason why he pled guilty to the offense. The respondent was represented by counsel. He has not challenged the conviction subsequent to pleading guilty to the offense, and accept the sentence imposed by the Court without appealing. I consider it established that the respondent did, in fact, have sexual contact with a young female. Considering that the respondent has abused a young female, he has, in fact, been convicted of a crime involving sexual abuse of a minor, and, therefore, an aggravated felony. I think he has to show equities which rise to a fairly significant level in order to merit the granting of relief.

The significant factors or equities in the respondent's case are, of course, the duration of his presence in the United States. He has been in the U.S. for 19 years, that is since 1985 when he entered. He has been a permanent resident for over 14 years, and he has lived in the United States throughout that time, although his family is in Honduras. I think the duration of his residence is a very strong, favorable factor in his case. The respondent has been working in the United States apart from his conviction of retail theft, a misdemeanor, and also sexual abuse in the fourth degree, also a misdemeanor, he has not had any convictions in the last eight years. He has also been employed during that time.

I do not agree with the Department's contention that his trips to Honduras mean that he is, if sent back there, in a

situation which is not much different from that of being in the United States, or that sending him back to Honduras would have no consequences on his family there. Only on a superficial level would it reunite him with his family. Clearly the respondent has maintained throughout, not only the documents filed, but in his testimony, that his presence in the United States is to work and to support his family in Honduras. He has pointed out how difficult the situation for finding employment is in Honduras, not only generally, but for him specifically because of his limited ability to lift in working on a job, and the likelihood

[Page 10 of original opinion is missing]

States and departure from the United States is credible. I am very skeptical, in fact, rather disbelieving of his testimony concerning his touching the defendant in the offense which culminated in his conviction of sexual abuse in the fourth degree. I do not believe that that testimony is credible. However, the respondent has expressed remorse for that offense, and I do not think that that should be dismissed out of hand. More importantly, the passage of time gives expression, I think, to the respondent's claims of being rehabilitated. The 7th Circuit Court of Appeals in Palacios-Torres V. INS, 7th Circuit, May 18, 1993, held that rehabilitation has two focuses. One is the restoration of an individual to a new way of life, in that case, a drug free way of life, and the other, a more general condition is that it is a restoration to a way of life where future criminal conduct is unlikely. In this case, the respondent is not associating with the same people anymore, or so he says in his testimony, and, in addition, a significant period of time, namely eight years, has elapsed since his conviction. That period I think one can measure the respondent's intentions by his actions. The record indicates that he has not been convicted of any crime since 1996. I think, therefore, that it can be said that the respondent has been reformed so that he has chosen a way of life where future criminal misconduct is unlikely

because he has not been involved in criminal misconduct since his November of 1996 conviction.